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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1266

KENNEBEC LOG DRIVING COMPANY,
SCOTT PAPER COMPANY,
HUDSON PULP & PAPER CORPORATION,
Petitioners,

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

ROBERTS B. OWEN
WILLIAM D. IVERSON
COVINGTON & BURLING
888 Sixteenth Street, N.W.
Washington, D. C.
Attorneys for Appellees

Of Counsel:
VINCENT L. McKUSICK
DANIEL E. BOXER
PIERCE, ATWOOD, SCRIBNER, ALLEN & McKUSICK
One Monument Square
Portland, Maine 04111

LOYALL F. SEWALL
VERRILL, DANA, PHILBRICK, PUTNAM & WILLIAMSON
57 Exchange Street
Portland, Maine

NORMAN M. HERRMAN
ELLIS A. HORWITZ
Scott Paper Company
Scott Plaza
Philadelphia, Pennsylvania 19113

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UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit in *United States of America* v. *Kennebec Log Driving Co., et al.*, entered November 30, 1973. That judgment vacated an order of the District Court for the District of Maine (per Gignoux, J.), which granted a summary judgment in favor of the petitioners on March 7, 1973, and dismissed the complaint filed by the respondent United States of America. At petitioners' request the Court of Appeals has stayed its mandate pending disposition of this petition for certiorari.

OPINIONS BELOW

The opinion of the Court of Appeals has reported. It is printed as Appendix B. (Ap The opinion and order of the District Court i at 356 F. Supp. 344. It is printed as Ap (App. 1a-21a)

JURISDICTION

The judgment of the Court of Appeals w on November 30, 1973 and is printed as Aj (App. 1c) The Court of Appeals denied a t tion for rehearing filed by the responde States on December 19, 1973; that order is Appendix D. (App. 1d) The jurisdicti Court is invoked under 28 U.S.C. § 1254(1)

ISSUE PRESENTED

Since colonial days "river log driving" h established and important means of comme gation, and on certain types of rivers the a explicitly "legalized" by a 1900 federal st ject only to regulation by the Secretary of The Court of Appeals below, reversing t Court, has now interpreted an *earlier* en Congress—Section 13 of the Rivers and H of 1899—in such a way that it may be prevent the very activity which was aut Congress in 1900. The question presented the Court of Appeals' construction is cons established canons of statutory interpret due weight to long-standing administrati and accords with this Court's prior constru Rivers and Harbors Act of 1899 in *Unite Pennsylvania Indus. Chem. Corp.*, 411 U.S.

STATUTORY PROVISIONS INVOLVED

The provisions of Sections 10, 13 and 15 of th Rivers and Harbors Act of 1899, 33 U.S.C. §§ 403, 407 409, and of the Act of May 9, 1900, 33 U.S.C. § 410, ar set forth in relevant part in Appendix E. (App. 1e-3e

STATEMENT OF THE CASE

This case was initially decided upon cross-motion for summary judgment in the District Court. Th material facts were and are undisputed.

Petitioner Kennebec Log Driving Compan ("KLD") is a membership corporation which ha conducted an annual "log drive"—an operation de scribed in greater detail below—on the upper Kennebe River since 1835 under a special charter granted b the Legislature of the State of Maine. Because of th numerous shoals and dams on the upper Kennebe these log drives have been and are the principal, an indeed the only, form of commercial navigation o this portion of the river. For more than 70 yea KLD has conducted these log drives, without obje tion from any agency of the United States, in reliand upon a 1900 statute (cited immediately below) whic explicitly authorizes such log drives on rivers suc as the upper Kennebec.

By this petition KLD and its members[1] seek a authoritative determination by this Court whethe

[1] At the time the Complaint was filed in this action, the me bers of KLD were petitioners Scott Paper Company ("Scott" and Hudson Pulp and Paper Corporation. Although at one ti as many as 37 member companies placed logs in the river to driven by KLD, their numbers have dwindled over the years, a by the time this lawsuit was filed Scott was—and is today—t principal participant in the log drive.

Congress intended the specific provisions
of May 9, 1900, 33 U.S.C. § 410, to gover
on these rivers (as concluded by Judge G
whether it was the intent of Congress th
drives should, despite the specific authoriz
tion 410, remain subject to the general
against deposits of refuse contained in S
the 1899 Rivers and Harbors Act, 33 U.S.
concluded by the Court of Appeals).
which will be clarified below, the issue pr
is of vital importance to the entire log-driv
throughout the country.

Petitioners' Activities

It is undisputed, and both courts below
the Kennebec log drive is representative o
tional log drive" and that "the techniq
[in such log drives] have remained es
changed" for well over a century. (App
n.20; *see also* App. A at 2a-3a) Logs ar
the river bank and deposited in the water
current of the river is swift enough to ca
logs downstream, they are allowed to
"Booms," consisting of strings of log
gether by chains, are used to guide the lo
and other obstacles in order to keep them
channel. When the logs reach the he
formed by dams along the river, they ar
gathered together by other booms plac
river. As conditions permit, the logs are
"rafts" and towed across the lakes by
and then fed into sluiceways over the
the logs finally reach the mill for wh
destined, they are guided to the shore
removed from the river.

It is also undisputed—and indeed a necessary f
of nature—that "in the course of a drive a num
of logs inevitably become waterlogged and sink to
bottom", and "another acknowledged side effect of
log driving is the deposit . . . of quantities of b
which peel off the floating logs." (App. B at 3b (
omitted); *see also* App. A at 3a)

Statutory Framework

This case involves two statutes enacted by Cong
in successive years. The first is the Rivers and H
bors Act of 1899. It contains two general prohibiti
of potential applicability to log driving activities,
one provision which deals specifically with log driv

Section 10 of the 1899 Act, 33 U.S.C. § 403, p
hibits "the creation of any obstruction . . . to
navigable capacity of any of the waters of the Un
States," unless permission is obtained beforeh
from the Secretary of the Army upon the recomm
dation of the Chief of Engineers. (App. E at
Section 13 of the 1899 Act, 33 U.S.C. § 407—now c
monly referred to as the "Refuse Act"—prohibits
"deposit" of "any refuse matter of any kind or
scription whatever . . . into any navigable water of
United States," unless a permit is obtained from
Secretary before hand. (*Id.* at 1e-2e)

In addition to enacting these general prohibit
in Sections 10 and 13, Congress dealt specifically
log driving in Section 15 of the 1899 Act, 33 U.
§ 409. That provision states in relevant part that

> "It shall not be lawful . . . to float loose tin
> and logs, or to float what is known as 'sack r
> of timber and logs' in streams or channels

tually navigated by steamboats in such manner as to obstruct, impede, or endanger navigation." (*Id.* at 2e)

Section 15 thus gave explicit priority to steamboat traffic wherever it conflicted with log driving—a lively problem on many rivers, particularly the Upper Mississippi, at the time.[2]

The following year, in 1900, Congress passed another statute dealing specifically with log driving. Acting in response to the protestations of log-driving interests that the prohibition contained in Section 15 of the 1899 Act was too sweeping, Congress passed the Act of May 9, 1900, 33 U.S.C. § 410. Section 410 provides in substance (1) that "the prohibition contained in [Section 15] . . . shall not apply to any navigable river . . . whereon the floating of loose timber and logs . . . is the principal method of navigation," subject only to the limitation (2) that "such method of navigation . . . shall be subject to the rules and regulations prescribed by the Secretary of the Army . . . ." (*Id.* at 3e)

Although the statutory language is clear, the legislative history of the 1900 Act is even more so. The report of the House members of the final conference committee states explicitly that the objective of the Act was to "exempt . . . the floating of logs and sack rafts [in the rivers involved] from the prohibitions included in the last river and harbor act," and that "it was agreed that the floating of logs, sack rafts, and timber should be allowed, under proper regulations, in [these] waterways . . . ." 33 *Cong. Rec.* 4870 (April 30, 1900).

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[2] *See, e.g.*, R. F. Fries, Empire in Pine: The Story of Lumbering in Wisconsin 1830-1900 at 141-60 (1951).

Proceedings Below

The Justice Department filed this suit on March 19, 1971, seeking an injunction against further Kennebec log drives and remedial relief for alleged past violations of the 1899 Rivers and Harbors Act by KLD and its members. No such lawsuit had ever previously been filed in the 72-year history of the 1899 Act. The Government's novel theories were (1) that the Kennebec log drives violate Section 10 of the 1899 Act because the floating logs and the booms used to control their passage downstream obstruct the navigable capacity of the river, and (2) that the bits of bark which sometimes slough off floating logs and the logs which occasionally sink during the drives constitute illegal "deposits" of "refuse" under Section 13 of the Act.

The defendants-petitioners denied that their activities violated Sections 10 and 13. As a threshold issue KLD and its members pointed out that the Government's Complaint ignored the two statutory provisions which deal specifically with log driving, Section 15 of the 1899 Act and the 1900 statute now codified as 33 U.S.C. § 410. The defendants-petitioners contended that the statutory framework as a whole, particularly when read in light of its legislative history and subsequent administrative interpretations, shows that Congress specifically authorized log drives on rivers such as the upper Kennebec when it enacted Section 410 in 1900, and that in doing so Congress intended Section 410 to supersede whatever applicability Sections 10 and 13 of the 1899 Act might otherwise have to log drives on such rivers.

After extensive discovery was completed, the parties agreed that there was no genuine dispute as to any

material fact relating to the merits, and the case was submitted to the District Court on cross motions for summary judgment.

The District Court's Decision. The District Court agreed with the defendants-petitioners' analysis of the case. In awarding a summary judgment for defendants and dismissing the action, Judge Gignoux reasoned as follows:

(1) By enacting Section 410 in 1900, Congress "explicitly authorized log drives on rivers, such as the upper Kennebec, where log drives are the principal method of navigation, subject only to regulation by the . . . Secretary of the Army." (App. A at 12a) The court so concluded both from a reading of the statutory language (*id.*) and from its examination of Section 410's legislative history which states explicitly that log driving "should be allowed" on such rivers (*id.* at 16a, *quoting from* 33 *Cong. Rec.* 4870, April 30, 1900).

(2) Since there is abundant evidence of "Congress' contemporaneous knowledge of log driving methods" in 1900, Congress must have intended its authorization of log driving on such rivers to encompass the necessary incidents of log driving, including specifically the use of booms and the sloughing off of bark and the sinking of logs. (*Id.* at 13a-15a)

(3) The application of "established principles of statutory construction" (*id.* at 13a, citations omitted) compels the conclusion that Congress must have intended its *specific* authorization of log driving and its necessary incidents (Section 410) to supersede whatever applicability its earlier *general* prohibitions against obstructions to navigation and deposits of

refuse (Sections 10 and 13 of the 1899 Act) might otherwise have had to rivers primarily used for log driving (*id.*). Judge Gignoux found this conclusion compelling because any other construction of the statutory scheme would "attribute to Congress an intent to legalize log driving and at the same time prohibit its unavoidable side effects" (*id.* at 14a), and because "the Government offer[ed] no alternative theory of what Congress intended to accomplish by enacting Section 410, or how Section 410 could have any effect except by reducing the reach of Sections 10 and 13" (*id.* at 14a n.15).

(4) This reading of the statutory scheme is supported by more than 70 years of consistent administrative interpretations, under which (a) the Secretary of War (and later the Secretary of the Army) has issued numerous regulations under Section 410 to regulate log driving (*id.* at 17a-18a & nn.17-18), and (b) the Government has never before attempted to apply Sections 10 and 13 of the 1899 Act to log driving on a river principally used for such navigation, either by bringing suit or issuing permits (*id.* at 18a-20a).

(5) Under this interpretation of the statutory scheme, the Kennebec log drives are lawful under Section 410 since "the undisputed facts appearing in the record" (*id.* at 20a) show that "the Kennebec drive is typical" of "the traditional river drive," which has "remained largely unchanged" since Congress enacted Section 410 in 1900 (*id.* at 12a).

Because the District Court found Section 410 controlling, it did not find it necessary to reach the defendants-petitioners' contentions that the Kennebec

log drives would not violate Sections 10 and 13 even i those provisions were applicable. (*Id.* at 10a & nn. 11 12)

The Opinion of the Court of Appeals. Although i found Judge Gignoux's opinion "thoughtful and well documented" (App. B. at 10b) and agreed with it i part, the Court of Appeals disagreed with a portion o the lower court's analysis. First, the Court of Appeal held that the District Court was correct in holdin that Section 410's authorization of log driving on river principally used for such navigation superseded wha ever applicability Section 10 of the 1899 Act migh otherwise have to such activities. It reached this co clusion primarily because Section 10, on the one han specifically refers to "booms" as a possible obstru tion to navigation (*see* App. E at 1e-2e), while, on th other hand, "the use of booms in the navigation floating logs was recognized by reference to booms" i the legislative history of Section 410. (App. B at 13b Given this evidence that Congress focused upon th use of booms in both statutes, the Court of Appea concluded that in authorizing log drives on the rive covered by Section 410, Congress "must necessari have also meant to exempt logging booms from a restrictions contained in any other section." (*Id.* 14b)

But the Court of Appeals refused to agree with t District Court that Section 410 also superseded wha ever applicability Section 13's prohibition against d posits of refuse might otherwise have to log drives the rivers involved, because "there is not a word the legislative history, or in the 1900 Act, concerni the sinking of water-logged timber, the sloughing

bark, or the pollution caused by log driving."[3] (*Id.* at 12b)

In concluding that Section 410 did not affect the potential reach of Section 13 of the 1899 Act vis-a-vis log drives on logging rivers, the Court of Appeals was also influenced by its analysis of the role Section 13 was intended to play in protecting the nation's rivers. The court concluded that Section 13 "was envisaged [by Congress] as a means of *regulating* and bringing under scrutiny actions which might threaten the well-being of the nation's waterways." (*Id.* at 11b) (Emphasis added.) Since the court further concluded that the regulatory program allegedly contemplated by Section 13 "was intended by the Congress to prevent pollution, as well as obstruction, of navigable waterways" (*id.* at 12b), the appellate court reasoned that there was no logical inconsistency in holding that while Section 410 "legalized" log drives on rivers principally used for such navigation (*id.*), log drives on such rivers remain subject to the regulatory program allegedly contemplated by Section 13 of the 1899 Act.

In light of its conclusion that the District Court had erred in holding that Section 410 superseded whatever applicability Section 13 of the 1899 Act might have to log drives on rivers such as the upper Kennebec, the Court of Appeals vacated the judgment below and remanded the case for further proceedings not inconsistent with its opinion. Thereafter, at petitioners' request, the court stayed its mandate pending disposition of the instant petition.

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[3] The quoted language is somewhat redundant. There is no contention in this case that log driving is responsible for "pollution" except to the extent that sunken logs and bits of bark may arguably be considered pollutants.

REASONS FOR GRANTING THE WRIT

I.

This Court has held many times that "statut interpretation requires more then concentration isolated words; rather, consideration must be given the total corpus of pertinent law and the policies t inspired ostensibly inconsistent provisions." *B Market* v. *Retail Clerks Local 770,* 398 U.S. 235, (1970); *accord, Richards* v. *United States,* 369 U.S 11 (1962); *Mastro Plastics Corp.* v. *NLRB,* 350 U 270, 285 (1956). The petitioners contend that Court of Appeals' conclusion that Section 410 had effect upon the reach of Section 13 of the 1899 vis-a-vis log drives was the product of just such improper "concentration on isolated words"—*e.g.,* happenstance that Congress did not refer specific to sunken logs or the sloughing off of bits of bark w it enacted Section 410. It is undisputed that ev log drive in history has involved the sinking of s logs and the sloughing off of occasional bits of barl is equally undisputed that Congress was thorou familiar with log driving as an important comme activity when it enacted Section 410 in 1900.[4]

It is an equally well-established principle, recogn by the District Court but overlooked by the Cou Appeals, that "however inclusive may be the ge language of a statute, it will not be held to apply matter specifically dealt with in another part of

[4] The defendants-petitioners demonstrated in the District that log driving was the subject of legislative attention on a nu of occasions during the years before 1900. *See, e.g.,* H.R. No. 54, 45th Cong., 3d Sess. 8-9, 11 (1879); Sen. Doc. No. 12 Cong., 1st Sess. 32, 36-37, 48-49, 72 (1885); H.R. Rep. No. 2 Sen. Rep. 224, 50th Cong., 1st Sess. (1888); H.R. Rep. No 51st Cong., 1st Sess. 2 (1890).

same enactment . . . . Specific terms prevail over the general in the same or another statute which might otherwise be controlling." *Fourco Glass Co.* v. *Transmirra Prods. Corp.*, 353 U.S. 222, 228-29 (1957); *see also, e.g., Clifford F. MacEvoy Co.* v. *United States*, 322 U.S. 102, 107 (1944). In this case, Congress dealt with log driving specifically on two occasions, first in prohibiting log drives whenever they would conflict with other forms of navigation in Section 15 of the 1899 Act, and then in removing this prohibition as to log drives on rivers principally used for such navigation (subject to regulations to be issued by the Secretary) in Section 410. The legislative history of the 1900 Act, moreover, demonstrates a careful and detailed consideration by Congress of the circumstances under which log driving was and was not to be authorized. (*See* App. A at 14a-17a) The Congressional purpose is clear: log drives were to be authorized on rivers such as the upper Kennebec. It would make no sense to conclude that Section 410 did not accomplish that goal because Congress explicitly amended only Section 15 of the 1899 Act, without specific mention of Section 13. As Justice Holmes pointed out, while sitting on circuit, "it is not an adequate discharge of duty for courts to say: We see what you are driving at, but you have not said it, and therefore we shall go on as before." *Johnson* v. *United States*, 163 F. 30, 32 (1st Cir. 1908); *see also, e.g., United States* v. *Hutcheson*, 312 U.S. 219, 235 (1941) ("legislation must not be read in a spirit of mutilating narrowness").

In attempting to justify its approach of reading Section 13 and Section 410 in complete isolation from one another, the Court of Appeals also relied upon a conception of Section 13 fundamentally inconsistent

with past decisions of its own and of this Cou
this case, the Court of Appeals held that Sec
was not "envisaged" by Congress "as a comple
hibition on any activity," but rather "as a m
regulating and bringing under scrutiny action
might threaten . . . the nation's waterways."
B at 11b) But the latter *regulatory* concep
Section 13 contrasts sharply with the same cou
clusion, in its recent decision in *United S*
Granite State Packing Co., 470 F.2d 303 (
1972), that Section 13 is primarily *prohibi*
nature: "Basically, it forbids certain condu
exceptions [*i.e.*, permits, when granted]." *Id*

This Court cited *Granite State* favorably in
sion last term in *United States* v. *Pennsylvani*
Chem. Corp. [*PICCO*], 411 U.S. 655, 662-63
Indeed, in the latter case this Court emphasi
more forcefully the essentially prohibitory n
Section 13. In holding that the absence of "
regulatory-permit program," *id.* at 662, wa
defense to prosecution under Section 13, th
held:

> "Section 13 declares in simple absolutes
> '[i]t shall not be lawful' to discharge o
> into navigable waters of the United St
> refuse matter of any kind or descripti
> ever' except as permitted by the Secreta
> Army." *Id.* at 669.

The Court further noted that Section 13 "co
criteria to be followed by the Secretary in iss
permits," *id.* at 668, and makes the Secret
thority to issue permits wholly "discretionar
"nothing in the Section *requires* the establis
such a program as a condition to rendering
ative," *id.* at 662 (emphasis in original).

In short, as this Court has interpreted Section 13 (and as petitioners believe the Court of Appeals itself has previously interpreted that provision), Congress intended by its enactment to prohibit certain conduct, subject only to such wholly "discretionary" permits as the Secretary might issue in certain cases. And, according to this Court's decision in *PICCO,* if the Secretary were to make a discretionary determination not to make any permits available for a particular type of activity falling within the scope of Section 13, those who wished to engage in the activity would have no right whatever to do so.

If this is so, however, the Court of Appeals' interpretation of the interaction between Section 410 and Section 13 of the 1899 Act cannot be correct. The Court of Appeals acknowledged that Section 410 was intended to "legalize" log driving on rivers principally used for such navigation. In other words, even the Court of Appeals agreed that Section 410 was intended to give would-be log drivers an affirmative right to conduct their business on rivers within the scope of that provision. But under this Court's decision in *PICCO,* a person wishing to engage in an activity subject to Section 13 of the 1899 Act has no right whatever: unless the Secretary decides, on a discretionary basis, to issue permits, the activity is prohibited "in simple absolutes." Petitioners submit that it necessarily follows (a) that Section 13, being "prohibitory," is inapplicable to the traditional log drive on the rivers defined in Section 410 and (b) that the Court of Appeals' conclusion to the contrary is erroneous.

It should be emphasized that the distinction between a "regulatory" and a "prohibitory" statute is not merely a matter of semantics. If Congress intended

to "legalize" log driving (App. B at 12b clearly did—it could not have contemplated driving on the rivers involved would rema to the flat prohibition of Sectoin 13 of the Conversely, if Congress had really wanted a regulatory program of the sort that could to log driving without totally emasculatin 410—rather than opting for the prohibitory reflected in Section 13—it was quite capabl so, as this Court recognized in *PICCO*. *Se* at 655 and n.11 (citing the regulatory pro Section 11 of the 1899 Act, 33 U.S.C. § 404). that Congress did not follow that course evidence that, as this Court held in *PICCO* intended primarily to prohibit certain condu ing Section 13, and not to create a regulator

II

This Court has also held many times that struction of a statute by those charged with tion should be followed unless there are indications it is wrong." *Red Lion Broadc FCC*, 395 U.S. 367, 381 (1969); *accord, e.g. Duke Power Co.*, 401 U.S. 424, 433-34 (197 *States* v. *City of Chicago*, 400 U.S. 8, 10 (19 v. *Martin*, 397 U.S. 552, 559 (1970). Such a tive interpretations are entitled to particu when they reflect "a contemporaneous cons a statute by the men charged with the respo setting its machinery in motion. . . ." *Udall* 380 U.S. 1, 16 (1965).

In reaching its decision in this case, th Appeals paid no heed whatever to a patte sistent administrative interpretation of th framework which began contemporaneousl

enactment of Section 410 and which has continued to the present day. The administrative official responsible for implementing the new statute, the Secretary of War (now the Secretary of the Army), quickly and unambiguously interpreted the 1900 Act as superseding the 1899 Act insofar as log driving on the rivers involved was concerned. In his 1900 Annual report he stated

> "A larger number of rivers is included in the class *excepted from the law of 1899*, and different regulations based upon the varying conditions will be required for each river." *Annual Report of the War Department, Report of the Chief of Engineers*, H.R. Doc. No. 2, Vol. II, pt. 1, 56 Cong. 1st Sess. 44 (1900) (emphasis added).

Immediately thereafter the Secretary began issuing regulations to regulate log driving under the authority granted by Section 410, many of which are still in effect.[5] In contrast to the contemporaneous and consistent pattern of regulating log drives under Section 410, the Secretary has never issued any regulations or granted any permits relating to log driving under Section 13 of the 1899 Act.[6]

Because the Court of Appeals ignored these long-standing administrative interpretations, and accorded them no weight in analyzing the relationship between Section 410 and Section 13 of the 1899 Act, its opinion

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[5] Citations to these regulations are set forth in the Opinion of the District Court. (*See* App. A at 17a-18a & nn.17, 18) It is undisputed that the Secretary has never issued regulations governing the Kennebec log drives, although he could do so, of course, if he believed that such regulation was necessary.

[6] *See id.*

is in conflict with the previous decisions of
cited above.

III

The question whether Section 410 supersc
13 of the 1899 Act as to log driving on rivers
used for such navigation is important not o
tioners but also for the numerous other
that conduct log driving or rafting opera
Court of Appeals decision would make eve
ing or rafting activity in the United State
vulnerable to prosecution under Section 13.
of Appeals explicitly recognized the far-r
portance of its decision:

> "Resolution of the issue presented i
> with its possibility of recurrence w
> driving is still carried on, presents u
> we consider to be an important quest
> which it is our duty to resolve." (Ap

As the Court of Appeals was evidently
are a substantial number of log driving
operations in various sections of the cou
log drives may be of lesser importance
Northeast than when Congress enacted Se
1900, the timber industry in other regions,
the Pacific Northwest, still depends heavil
transportation of logs. It has been es
example, that from 2.8 to 3 billion board f
cut in the Pacific Northwest were transpo

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[7] In order to resolve the issue presented by this
involves only the interpretation of the relationship
410 and Section 13 of the 1899 Act—the Court need
effect, if any, the Federal Water Pollution Control A
of 1972, 86 Stat. 816, may have upon the operatio
of the 1899 Act.

in 1971.[8] For this reason petitioners respectfully
mit that the erroneous decision of the Court of A
is of sufficiently far-reaching importance to r
review and correction by this Court.

CONCLUSION

For the foregoing reasons, the petition for a w
certiorari should be granted.

Respectfully submitted,

ROBERTS B. OWEN
WILLIAM D. IVERSON
Covington & Burling
888 Sixteenth Street, N.W.
Washington, D.C.
Attorneys for Appellees

Of Counsel:

VINCENT L. MCKUSICK
DANIEL E. BOXER
Pierce, Atwood, Scribner,
Allen & McKusick
One Monument Square
Portland, Maine 04111

LOYALL F. SEWALL
VERRILL, DANA, PHILBRICK, PUTNAM &
WILLIAMSON
59 Exchange Street
Portland, Maine

NORMAN M. HEISMAN
ELLIS A. HORWITZ
Scott Paper Company
Scott Plaza
Philadelphia, Pennsylvania 19113

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[8] *See* LOG STORAGE & RAFTING IN PUBLIC WATERS: A TAS
REPORT APPROVED BY THE PACIFIC NORTHWEST POLLUTION
COUNCIL 1 (1971).

APPENDIX A

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

SOUTHERN DIVISION

UNITED STATES OF AMERICA, Plaintiff	:	
v.	:	CIVIL NO. 12-77
KENNEBEC LOG DRIVING COMPANY, SCOTT PAPER COMPANY, and HUDSON PULP AND PAPER CORP., Defendants	:	

OPINION AND ORDER OF THE COURT

GIGNOUX, J.

This is a suit by the United States under the Rivers and Harbors Act of 1899, as amended, 33 U.S.C. § 401 et seq., to enjoin defendant companies from engaging in any further log-driving activities on the upper reaches of the Kennebec River. The government charges (1) that the placing of logs into the river and the construction and maintenance of log-driving "booms" on the river, without the authorization of the Secretary of the Army, create obstructions to the navigable capacity of the Kennebec, in violation of Section 10 of the Act, 33 U.S.C. § 403, and (2) that the settling on the bottom of the river of water-soaked logs and of bark which has peeled from the logs in the course of the log drive, in the absence of a permit from the Secretary of the Army, constitutes an unlawful deposit of refuse matter into the Kennebec, in violation of Section 13 of the Act, 33 U.S.C. § 407. The parties have completed

extensive discovery. Being in agreement that there is no genuine issue as to any material fact, both plaintiff and defendants have moved for summary judgment. Fed. R. Civ. P. 56(c).

Defendant Kennebec Log Driving Company is a "non-stock membership corporation," which has been engaged in the driving of logs on the upper Kennebec since 1835, when the Legislature of the State of Maine by a special statute authorized it and its member companies to use the Kennebec for transporting logs to their pulp mills further downstream. Private and Special Laws of Maine of 1829-35, ch. 590 (1835). Throughout the nineteenth century the Kennebec Company drove logs for a substantial number of member companies (37 in 1893), but by 1972 defendant Scott Paper Company and Statler Tissue Corporation were the only active members. The volume of logs driven each year, however, has remained relatively constant, fluctuating only with general business conditions.

The methods by which the logs are driven has also remained largely unchanged. The traditional river drive, of which the Kennebec drive is typical, has used the following procedures.[2/]

1/ Defendant Hudson Pulp and Paper Corp., while still technically a member of the Kennebec Company, is no longer placing logs in the annual drive because it no longer operates a pulp mill in Maine.

2/ For an authoritative description of the traditional log drive both parties refer to a recognized early treatise, Bryant, The Principles and General Methods of Operation in the United States (2d ed. 1923).

cut pulpwood[3] is brought to the river bank and deposited in the river to commence its trip to the mill. Where the current of the river is swift enough to carry the loose logs downstream, they are allowed to be so carried. "Booms" (usually strings of logs fastened together by chains) are used to guide the logs past inlets and other obstacles in order to keep them in the main channel of the river. When the logs reach the heads of lakes formed by dams along the river, they are held for varying periods behind more elaborate booms strung across the lakes. As conditions permit, the logs are then gathered into "rafts" and towed by small boats across the lakes to the dams, where the logs are fed into sluiceways over the dams.[4] Finally, when the logs reach the mill for which they are destined, they are guided by booms toward the shore, removed from the river, and processed for the manufacture of paper. Every log drive, including the Kennebec log drive, necessarily involves some sloughing off of bark into the river and the sinking of logs which have become waterlogged. Although the precise figures are in dispute, a not insignificant quantity of bark and waterlogged logs thus settles to the bottom of the Kennebec.[5]

3/ "Long logs" have not been included in the Kennebec drive since 1939.

4/ On the upper Kennebec, the towing process occurs at three points: at Moosehead Lake (the headwaters of the Kennebec), at Indian Pond (the next lake downstream), and at Wyman Lake (the last lake on the river).

5/ Scott estimates that, over the years, 1.98% of the pulpwood it has placed in the river has sunk. The government believes this figure is underestimated.

Although log driving on the upper reaches of the Kennebe
on rivers all over the country, has been going on for nearly a
century and a half, only recently has it become a matter of pu
concern, mainly in regard to its ecological impact. This conc
has been voiced both in Maine and nationally. In May 1971 the
Legislature passed a law declaring that log driving on all Mai
rivers must end by October 1, 1976, 38 M.R.S.A. § 418; but ev
prior to the enactment of this legislation, and well before th
present suit was filed, defendant Scott had publicly announce
the Kennebec log drive would come to an end no later than Oct
1976, an action of which both houses of the Maine Legislature
expressed their appreciation in a joint order. H.P. 795, 1 M
Leg. Rec. 470 (1971). In addition, on the national level, su
quent to the institution of this action, Congress has passed
extensive Federal Water Pollution Control Act Amendments of 1
Pub. L. No. 92-500 (Oct. 18, 1972), 86 Stat. 816 et seq., sup
menting the Federal Water Pollution Control Act of 1970, 33 U
§ 1151 et seq. Counsel agree, however, that these amendment
no direct bearing on the instant suit. See Pub. L. No. 92-5
§ 4(a), 86 Stat. 896; 118 Cong. Rec. S16882-83, H9123 (daily
Oct. 4, 1972); United States v. Consolidated Coal Company, C
72-31-P (N.D. W.Va., Jan. 11, 1973).

Four sections of the Rivers and Harbors Act are releva
this case:

(1) Section 10 of the Act, 33 U.S.C. § 403, prohibits: (1) "the creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States," and (2) "the building of any ... boom ... or other structures in any ... navigable river, or other water of the United States ... except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army ...." [6/]

(2) Section 13 of the Act, 33 U.S.C. § 407, makes it unlawful to deposit in navigable waters "any refuse matter of any kind

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6/ Section 10 provides in full:

> Obstruction of navigable waters generally; wharves; piers, etc.; excavations and filling in
>
> The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same.

or description whatever" (other than liquid sewage), exce

in accordance with a permit from the Secretary of the Arm

7/ Section 13 provides in full:

Deposit of refuse in navigable waters generally

It shall not be lawful to throw, discharge, or deposit cause, suffer, or procure to be thrown, discharged, or de either from or out of any ship, barge, or other floating of any kind, or from the shore, wharf, manufacturing esta ment, or mill of any kind, any refuse matter of any kind description whatever other than that flowing from streets sewers and passing therefrom in a liquid state, into any navigable water of the United States, or into any tributa any navigable water from which the same shall float or b into such navigable water; and it shall not be lawful to or cause, suffer, or procure to be deposited material of in any place on the bank of any navigable water, or on t of any tributary of any navigable water, where the same liable to be washed into such navigable water, either by or high tides, or by storms or floods, or otherwise, whe navigation shall or may be impeded or obstructed: Provi That nothing herein contained shall extend to, apply to, prohibit the operations in connection with the improveme navigable waters or construction of public works, consid necessary and proper by the United States officers super such improvement or public work: And provided further, Secretary of the Army, whenever in the judgment of the Engineers anchorage and navigation will not be injured may permit the deposit of any material above mentioned navigable waters, within limits to be defined and under conditions to be prescribed by him, provided applicatio made to him prior to depositing such material; and when any permit is so granted the conditions thereof shall b strictly complied with, and any violation thereof shall unlawful.

(3) Section 15 of the Act, 33 U.S.C. § 409, makes it unlawful "to float loose timber and logs, or to float what is known as 'sack rafts of timber and logs' in streams or channels actually navigated by steamboats in such manner as to obstruct, impede, or endanger navigation. ..." 8/

(4) The Act of May 9, 1900, 31 Stat. 172, now codified as 33 U.S.C. § 410, provides in part: 9/

8/ Section 15 provides in full:

> Obstruction of navigable waters by vessels; floating timber; marking and removal of sunken vessels
>
> It shall not be lawful to tie up or anchor vessels or other craft in navigable channels in such a manner as to prevent or obstruct the passage of other vessels or craft; or to voluntarily or carelessly sink, or permit or cause to be sunk, vessel or other craft in navigable channels; or to float loose timber logs, or to float what is known as "sack rafts of timber and l in streams or channels actually navigated by steamboats in such manner as to obstruct, impede, or endanger navigation. And wh ever a vessel, raft, or other craft is wrecked and sunk in a navigable channel, accidentally or otherwise, it shall be the duty of the owner of such sunken craft to immediately mark it with a buoy or beacon during the day and a lighted lantern at night, and to maintain such marks until the sunken craft is removed or abandoned, and the neglect or failure of the said owner so to do shall be unlawful; and it shall be the duty of the owner of such sunken craft to commence the immediate remov of the same, and prosecute such removal diligently, and failur to do so shall be considered as an abandonment of such craft, and subject the same to removal by the United States as provid for in sections 411 to 416, 418, and 502 of this title.

9/ 33 U.S.C. § 410 provides in full:

> Exception as to floating loose timber, sack rafts, etc.; violation of regulations; penalty
>
> The prohibition contained in section 409 of this title aga floating loose timber and logs, or sack rafts, so called, of

The prohibition contained in Section 409
title against floating loose timber and log
rafts, so called, of timber and logs in str
channels actually navigated by steamboats,
apply to any navigable river or waterway of
States or any part thereof whereon the floa

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timber and logs in streams or channels actually nav
steamboats, shall not apply to any navigable river
of the United States or any part thereof whereon th
loose timber and logs and sack rafts of timber and
principal method of navigation. But such method of
on such river or waterway or part thereof shall be
the rules and regulations prescribed by the Secret
Army as provided in this section.

The Secretary of the Army shall have power, and
and directed to prescribe rules and regulations, w
any time modify, to govern and regulate the floati
timber and logs, and sack rafts, (so called) of ti
and other methods of navigation on the streams and
any thereof, of the character, as to navigation, h
this section described. The said rules and regula
be so framed as to equitably adjust conflicting in
the different methods or forms of navigation; and
and regulations shall be published at least once i
paper or newspapers of general circulation as in t
the Secretary of the Army shall be best adapted to
of said rules and regulations to persons affected
locally interested therein. And all modifications
and regulations shall be similarly published. An
and regulations when so prescribed and published
stream or waterway shall have the force of law, a
tion thereof shall be a misdemeanor, and every pe
of such violation shall be punished by a fine of
$2,500 nor less than $500, or by imprisonment (in
natural person) for not less than thirty days nor
year, or by both such fine and imprisonment, in t
of the court: Provided, That the proper action t
provisions of this section may be commenced befor
judge, or court of the United States, and such co
judge, or court shall proceed in respect thereto
by law in the case of crimes or misdemeanors com
the United States.

> loose timber and logs and sack rafts of timber and logs is the principal method of navigation. But such method of navigation on such river or waterway or part thereof shall be subject to the rules and regulations prescribed by the Secretary of the Army as provided in this section.
>
> The Secretary of the Army shall have power, and he is authorized and directed to prescribe rules and regulations, which he may at any time modify, to govern and regulate the floating of loose timbe and logs, and sack rafts, (so called) of timber an logs and other methods of navigation on the stream and waterways, or any thereof, of the character, a to navigation, heretofore in this section describe The said rules and regulations shall be so framed as to equitably adjust conflicting interests betwe different methods or forms of navigation ....

Defendants concede that the upper Kennebec is a navigable of the United States and that the Rivers and Harbors Act is as cable to the Kennebec as it is to any other navigable river, cf. Central Maine Power Co. v. F.P.C., 345 F.2d 875 (1st Cir. 1965); Wisconsin Public Service Corp. v. F.P.C., 147 F.2d 743 (7th Cir. cert. denied, 325 U.S. 880 (1945). Defendants also concede that they have not applied for or obtained any permit or authorizati from the Secretary of the Army under Section 10 or 13 to conduct their log-driving activities. The government concedes that log driving has always been the principal method of navigation on t upper Kennebec.[10/] The parties further agree that the Secretary o

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10/ Indeed, so far as the record discloses, it appears that, o than occasional recreational boating, log driving is the o form of navigation that has ever occurred on the upper Ken

the Army has never issued any rule or regulation gove
driving on the Kennebec.

The government contends that the logs and booms
defendants in the river create obstructions to naviga
violation of Section 10 of the Act, and that the sett
and water-soaked logs on the bottom of the river cons
unlawful deposit of refuse matter in violation of Sec
Defendants' basic position[11/] is that Sections 10 and 1
are not applicable to their log-driving operations i
specific language of Section 410. The Court agrees
that the structure of the Act, and the legislative a
history of Section 410, make clear the intent of Con
Section 410 to exclude traditional log-driving activ
such as the Kennebec from the prohibitory language o
and 13.

Defendants do not seriously contest the facial
of Sections 10 and 13 to their activities.[12/] Indeed,
be doubted that the loose logs and booms in the riv

11/ In light of the Court's disposition of the act
reach defendants' alternate contention that in
type of log-driving operations being conducted
Kennebec does not fall within the prohibitions
and 13.

12/ Defendants do argue, however, that their log-d
do not in fact violate Sections 10 and 13, a
Court does not find it necessary to reach. S

"obstruction" within the meaning of Section 10, or that the pe
bark and sunken logs on the river bottom are deposits of "refu
matter" within the meaning of Section 13. See United States v
Republic Steel Corp., 362 U.S. 482 (1960); United States v. St
Oil Co., 384 U.S. 224 (1966); United States v. Maplewood Poult
327 F. Supp. 686 (D. Me. 1971). But when the Act as amended
as a whole, it is plain that the provisions of Section 410, w
deal specifically with log drives, and not the general prohib
of Sections 10 and 13, control this suit.

The government's theory of this case depends entirely u
breadth of the statutory language of Sections 10 and 13 prohi
"any obstruction," including "any ... boom," and "any refuse
without prior authorization by the Secretary of the Army. Th
prohibitions of Sections 10 and 13, however, cannot be read i
isolation from the Act as a whole. "Statutory interpretatio
requires more than concentration on isolated words; rather,
eration must be given to the total corpus of pertinent law a
policies that inspired ostensibly inconsistent provisions."
Market v. Retail Clerks Local 770, 398 U.S. 235, 250 (1970).
also Richards v. United States, 369 U.S. 1, 11 (1962); Mastr
Plastics Corp. v. NLRB, 350 U.S. 270, 285 (1956). The 1899
as originally enacted, in addition to the general provisions
Sections 10 and 13 concerning obstructions to navigation and
of refuse matter, dealt specifically with log driving. Sect

of the Act prohibited log driving which might interfere with navigation on any river actually navigated by steamboats.[13] In an evident effort to establish a rational balance between the substantially incompatible interests of steamboating and log driving on the nation's rivers, Section 15 thus gave priority to steamboat traffic wherever a conflict might exist. The following year, apparently dissatisfied with the balance it had struck, Congress retreated from the one-sided approach of Section 15. By the Act of May 9, 1900, now 33 U.S.C. § 410, Congress explicitly authorized[14] log drives on rivers, such as the upper Kennebec, where log drives are the principal method of navigation, subject only to regulation by the Secretary of War (now the Secretary of the Army), who was to "equitably adjust conflicting interests between the different methods or forms of navigation." Thus, at least with respect to rivers where log driving was the principal form of navigation, Congress settled on a

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13/ As a corollary, it would appear that Section 15 by implication authorized log driving on rivers where steamboats did not operate.

14/ The government argues that in effecting a limited removal of the prior ban on log driving, Congress was creating only a "partial exemption" to the prohibition and was not "authorizing" anything. But the statute does do more than merely lift a prohibition, in that it goes on to provide that "such method of navigation [i.e., log driving] ... shall be subject to the rules and regulations prescribed by the Secretary of the Army ...." This surely indicates that Congress contemplated that log driving, under proper regulation, would occur on the specified rivers.

regulatory rather than a prohibitive approach. In doing so, the only reasonable conclusion is that Congress superseded Sections 10 and 13 insofar as they might otherwise apply to log drives on such rivers. Under established principles of statutory construction, "however inclusive may be the general language of the statute, it 'will not be held to apply to a matter specifically dealt with in another part of the same enactment. ... Specific terms prevail over the general in the same or another statute which might otherwise be controlling,' Ginsberg & Sons v. Popkin, 285 U.S. 204, 208" (1932). MacEvoy Co. v. United States, 322 U.S. 102, 107 (1944), quoted in Fourco Glass Co. v. Transmirra Prods. Corp., 353 U.S. 222, 228-29 (1957).

There can be no question that to the extent Section 410 authorizes log drives as such, it necessarily must authorize the booms, which have always been a necessary part of log driving, and the sloughing off of bark and the sinking of logs, which such drives inevitably entail. As the legislative history, discussed infra, demonstrates, when Congress enacted Section 410 in 1900, it not only knew that the use of booms was an essential part of the log drives it was authorizing but it actually had booms in mind when it wrote the provision. Furthermore, given Congress' contemporaneous knowledge of log-driving methods, also evident from the legislative history, it must have known that sloughage of bark and sunken logs

were inherent in the floating of logs in water. To say that Sectio 410 authorizes log driving on the rivers involved, but that Sectio 10 and 13 simultaneously prohibit the inherent characteristics of log drive, is to attribute to Congress an intent to legalize log driving and at the same time to prohibit its unavoidable side effe If the government's position were to be adopted, the result would to read Section 410 out of the Act. There is absolutely no legis- lative, administrative or judicial authority to support such a reading.

The legislative history of Section 410 confirms that Congre intended to authorize log drives and their necessary incidents on rivers such as the Kennebec, subject only to regulation by the Secretary of War. It also shows that Congress was aware in 1900 that the use of booms was an intrinsic ingredient of a log drive.

Research has disclosed no presently meaningful legislative history of Sections 10, 13 and 15, the portions of the 1899 Act relevant to this case.[16/] But the reaction to Section 15's outrigh

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15/ The government offers no alternative theory of what Congres intended to accomplish by enacting Section 410, or of how Section 410 could have any effect except by reducing the re of Sections 10 and 13.

16/ As the Supreme Court has observed, the 1899 Act was a codi tion of existing laws relating to navigable waters and cont no substantive changes. United States v. Republic Steel C supra, 362 U.S. at 486; United States v. Standard Oil Co., supra, 384 U.S. at 226-28.

prohibition against floating logs on rivers navigated by steamboats was immediate. In the first days of the next session of Congress a bill was introduced in the House of Representatives to remove the prohibition against floating logs from Section 15. 33 Cong. Rec. 840 (Jan. 15, 1900) (H.R. 6249). The Committee on Rivers and Harbors, to which the bill was referred, reported back a substitute bill which exempted the upper Mississippi River "above the St. Paul Boom" and certain of its tributaries from Section 15, and provided for the regulation of log drives on such rivers by the Secretary of War. 33 Cong. Rec. 3108 (Mar. 20, 1900) (H.R. 9824). The Committee Report described the conduct of log drives on the named rivers, specifically referring to the use of booms, and pointed out the inevitable obstruction to steamboat navigation which resulted. H.R. Rep. No. 731, 56 Cong., 1st Sess. 3 (1900). Nevertheless, the Committee recommended adoption of the bill to "provide that upon such streams this navigation by logs ... shall be conducted under such regulations as the Secretary of War may from time to time make." Id. at 4. The House of Representatives passed the bill on the basis of the Committee chairman's characterization that it "provide[d] for an exception to the general law in the regulations for the rivers included." 33 Cong. Rec. 3233 (Mar. 23, 1900) (emphasis added).

When the bill reached the Senate, the Committee on Commerce broadened the House bill to provide that the Secretary of War might

issue regulations for any river "whenever in his judgment such
lations are necessary to equitably adjust and govern the confli
interests of logging and other forms of navigation." 33 Cong.
4405 (Apr. 19, 1900) (H.R. 9824 reported); Sen. Rep. No. 1035,
Cong., 1st Sess. (1900). The Senate passed the amended bill w
debate. 33 Cong. Rec. 4586 (Apr. 24, 1900).

The Conference Committee struck the eventual compromise
became Section 410. The House Conferees explained the final b
follows:

> The bill as it passed the House made provision only
> for certain rivers and portions of rivers in the state
> of Minnesota and Wisconsin, in which the floating of
> and sack rafts was the predominate form of navigation
> After the bill passed the House it developed that simi
> conditions prevailed upon other waterways in differen
> portions of the country. ... This led the Senate to
> the bill quite materially, so as to provide that regu
> tions might be made available for the extension of th
> exemption to all navigable rivers or waterways of the
> United States.
>
> In conference it did not seem best to so enlarge t
> scope of the original bill, and it was agreed that th
> floating of logs, sack rafts, and timber should be al
> under proper regulations, in waterways where the flo
> of timber is the principal method of navigation. ...
> 33 Cong. Rec. 4870 (Apr. 30, 1900) (emphasis added).

It was made explicit by the Conferees that the objective of
legislation was "exempting ... the floating of logs and sack
[in the rivers involved] from the prohibitions included in t
river and harbor Act." Idem. (emphasis added).

The legislative history of Section 410 thus clearly demonstrates that Congress intended, in the balance finally struck, to authorize log driving, with its necessary incidents, on rivers principally used for log driving, subject only to regulation by the Secretary of War.

This conclusion as to the intent of Congress in enacting Section 410 is buttressed by the long-standing administrative construction of the statute by the officials charged with its administration. The Secretary of War quickly and unambiguously interpreted Section 410 as superseding the 1899 Act. In his 1900 Annual Report he described Section 410 as removing a large number of rivers from the operation of the 1899 Act:

> A large number of rivers is included in the class excepted from the law of 1899, and different regulations based upon the varying conditions, will be required for each river. Detailed investigation will be necessary to determine the condition in each case and to insure as nearly as possible an equitable adjustment of conflicting interests, as required by the new law. Annual Reports of the War Department, Report of the Chief of Engineers, H.R. Doc. No. 2, vol. II, pt. 1, 56th Cong., 1st Sess. 44 (1900) (emphasis added).

Immediately thereafter, the Secretary, acting under the authority of Section 410, began issuing regulations for several rivers, idem., and he has continued to issue such regulations, many of which are still in the Code.[17/] These regulations specify in detail when and

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17/ See, e.g., 33 C.F.R. §§ 207.290 (Current River, Mo.) (Mar. 2, 1916), 207.350 (St. Croix River, Wisc. and Minn.) (Apr. 20, 1907), 207.380 (Red Lake River, Minn.) (Feb. 24, 1905), 207.490 (Cheboygan River, Mich.) (July 11, 1903), 207.770 (Snoqualmie and Snohomish Rivers, Wash.) (Apr. 27, 1910).

As previously noted, the Secretary has never issued any regulation regulating log driving on the Kennebec, presumably because of the

in what manner log driving, including the use of booms, is to
permitted on the rivers involved. In contrast to the contem
and consistent pattern of regulating log driving and booms u
Section 410, the Secretary has never issued any regulations
granted any permits relating to log driving under Section 10
The argument is persuasive that he has not done so because h

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absence of steamboating on the upper reaches of the riv
the log drive is conducted.

18/ In response to defendant Scott's interrogatories, the
has listed 12 regulations purportedly issued pursuant
Section 10 or 13 regulating the use of booms in connect
log drives. Eleven of these, however, were in fact is
pursuant to Section 410, Annual Reports of the War Dep
Report of the Chief of Engineers, pt. 1, H.R. Doc. No.
V, 58th Cong., 3rd Sess. 710-11 (1904) (33 C.F.R. §§ 2
207.370, 207.380, 207.660 (1972)); Annual Reports of t
Department, Report of the Chief of Engineers, pt. 1, H
No. 2, vol. V, 59th Cong., 1st Sess. 719 (1905) (33 C.
§ 207.360 (1972)); Annual Reports of the War Departmen
II, Report of the Chief of Engineers, H.R. Doc., 61st
3rd Sess. 1019 (1910) (33 C.F.R. § 207.780 (1972)); An
Reports of the War Department, vol. II, Report of the
of Engineers, 1621 (1915) (33 C.F.R. § 207.330 (1972))
Reports of the War Department, vol. II, Report of the
Engineers, 1878 (1918) (33 C.F.R. § 207.270 (1972)); A
Reports of the War Department, Report of the Chief of
pt. 1, 2001 (1921) (33 C.F.R. § 207.730 (1972)); Annua
of the War Department, Report of the Chief of Engineer
2119 (1922) (33 C.F.R. § 207.720 (1972)); 12 Fed. Reg.
(1947) (33 C.F.R. § 207.663 (1972)). The remaining re
was issued under the general rule-making authority of
§ 1, 24 Fed. Reg. 3629 (1959) (33 C.F.R. § 207.655 (19
The current Code of Federal Regulations cites 33 U.S.C
as authority for all navigation regulations. See 33
Part 207 at 127 (1972).

always interpreted Section 410 as superseding Sections 10 and 13 to the extent the latter sections would otherwise be applicable to log-driving activities on these rivers. The actions of the Secretary in administering the 1899 Act and its 1900 amendment thus show that the government officials charged with implementing the statute have consistently considered that Section 410, and not Sections 10 and 13, governs the conduct of log drives on rivers such as the upper Kennebec where "the floating of loose timber or logs ... is the principal method of navigation."[19] It is, of course, an established principle that the construction of a statute by those charged with its implementation, while not conclusive, is entitled to "great weight" in construing the Act. United States v. Republic Steel Corp., supra, 362 U.S. at 490 n.5. See also, e.g., Griggs v. Duke Power Co., 401 U.S. 424, 433-34 (1971); United States v. City of Chicago, 400 U.S. 8, 10 (1970); Lewis v. Martin, 397 U.S. 552, 559 (1970); Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367, 381 (1969); Udall v. Tallman, 380 U.S. 1, 16 (1965).

19/ It would appear that the Department of Justice must also have long concurred with the Secretary's interpretation of the Act. Until the present suit was filed, the Attorney General has never invoked Sections 10 and 13 (either by filing enforcement suits or by bringing criminal charges) against log driving or its incidents on any river within the scope of Section 410.

Finally, the Court is not aware of any reported judi
decision discussing the applicability of Sections 10 and 1
1899 Act to log driving. The government cites two cases i
Section 10 of the Rivers and Harbors Act of 1890, 26 Stat.
(the predecessor of Section 10 of the 1899 Act) was appli
But United States v. Bellingham Bay Boom Co., 176 U.S. 21
was decided before Section 410 was enacted. And while Un
v. Wishkah Boom Co., 136 Fed. 42 (9th Cir. 1905) was deci
enactment of Section 410, there is no indication that the
considered that provision. The case merely held that the
statute was applicable to the boom in question.

Based upon the undisputed facts appearing in the re
Court holds that Sections 10 and 13 of the Rivers and Ha
of 1899, as amended, do not apply to defendants' log-dri
on the Kennebec River, in the face of the provisions of
§ 410, which deal specifically with log drives on rivers
log driving is the principal method of navigation. Sinc
present action is grounded solely upon alleged violation
Sections 10 and 13, plaintiff's motion for summary judgm
denied, and defendants' motions for summary judgment are
Judgment will be entered accordingly.

IT IS SO ORDERED.

Dated at Portland, Maine, this 7th day of March 1973.

/s/ Edward T. Gignoux

United States District Judge

A true copy
Attest:
Morris Cox, Clerk

By E. Ary
Deputy Clerk

APPENDIX B

United States Court of Appeals
For the First Circuit

No. 73-1163

UNITED STATES OF AMERICA,

APPELLANT,

v.

KENNEBEC LOG DRIVING COMPANY, et al.,

APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

Before COFFIN, *Chief Judge*,
McENTEE and CAMPBELL, *Circuit Judges*.

Walter Kiechel, Jr., Deputy Assistant Attorney General, with whom *Wallace H. Johnson*, Assistant Attorney General, *Peter Mills*, United States Attorney, *Raymond N. Zagone*, *Thomas C. Lee*, and *Carl Strass*, Attorneys, Department of Justice, were on brief, for appellant.

Roberts B. Owen, with whom *William D. Iverson*, *Covington & Burling*, *Vincent L. McKusick*, *Daniel E. Boxer*, *Pierce, Atwood, Scribner, Allen & McKusick*, *Loyall F. Sewall*, *Verrill, Dana, Philbrick, Putnam & Williamson*, *Norman M. Heisman*, and *Ellis A. Horwitz* were on brief, for appellees.

November 30, 1973

COFFIN, *Chief Judge*. Defendant Kennebec Log Driving Company is in the business of driving pulp logs down the Kennebec River to paper mills downstream. Defendants Scott Paper Company and Hudson Pulp and Paper Corporation have in the past engaged Kennebec Log Driving Company to perform this service for them, although at the present time only Scott Paper Company continues to do so.[1]

[1] In 1971 Hudson Pulp and Paper Corporation indicated that it intended to terminate its relationship with the Kennebec Log Driving Company and it now no longer places logs in the river.

The United States claims that this activity viola
provisions of the Rivers and Harbors Act of 1899
the floating of masses of logs and the erection and
nance of booms to guide and collect these logs co
obstruction to navigation on a navigable water
United States without a permit in violation of se
of the Act (33 U.S.C. § 403), and that the sin
some waterlogged timber and the sloughing off o
cant quantities of bark from the floating logs co
deposit of refuse in a navigable water of the Unite
without a permit in contravention of section 13 of
(33 U.S.C. § 407).[2] The government sought an in
against further log driving and a court order
affirmative remedial action including the remov
sunken logs from the Kennebec and the disma
all logging booms on the river.

On cross motions for summary judgment the co
356 F. Supp. 344 (D. Me. 1973), found that
of May 9, 1900 (33 U.S.C. § 410) created an
from the provisions of the Rivers and Harbor
1899 for log driving on rivers where log drivi
principal form of navigation, and, since it was un
that the Kennebec falls into that category of r
the activities of defendants are legal despite th
any permits.

I

This case requires us, in the eighth decade of
tieth century, to scrutinize the legislative histo
statutes passed at the turn of the century, as
wording of the statutes themselves, to see how
to a lawsuit impelled by contemporary concern
quality of our environment. The sole issue pr
us involves interpretation of the Act of May 9

[2] Defendants conceded below that the upper Kenneb
gable water of the United States within the purview
and Harbors Act of 1899.

of certain provisions of the Rivers and Harbors Act of 1899. Our concern is with the scope of the Act of 1900 and the extent to which it overrode the earlier Act as applied to log driving on rivers like the Kennebec.

Log driving has been carried out on the upper Kennebec River by the defendant log driving company since 1835[3] and the techniques involved have remained essentially unchanged down to the present. Pulpwood logs are placed in the river and allowed to float downstream on the force of the current. Booms, usually consisting of strings of logs fastened together with chains, are placed so as to guide the logs away from inlets and obstacles. Where there is insufficient current to carry the logs downstream they are collected in large booms and gathered together and formed into rafts which are towed by small boats to a point where the logs can again be released into the current. Where dams block the river the logs are sluiced over them. At the mill site the logs are guided toward the shore and removed from the river. In the course of a drive a number of logs inevitably become waterlogged and sink to the bottom.[4] Another acknowledged side effect of the practice of log driving is the deposit into the river of quantities of bark which peel off the floating logs. No permits have ever been sought by defendants from any federal government agency for their log driving activities.

Recent widespread concern over the quality of the environment has resulted in vigorous remedial action in a number of areas, including the enactment of comprehensive air and water quality legislation by the Congress. Although

[3] Private and Special Laws of Maine of 1829-35, ch. 590 (1835).

[4] According to the minimum figure presented to the district court, 1.98% of the pulpwood placed in the river sinks to the bottom.

the 1970 Federal Water Pollution Control Act[5] and the 1972 amendments[6] do not deal directly with the ecological impact of log driving upon the rivers used for such purposes,[7] concern over this problem in the state of Maine has led to action designed to curtail and eventually eliminate logging in the state's rivers. In 1971 the Great Northern Paper Company forecast the end of its log drives on the West Branch of the Penobscot River by 1972 at the latest, and Scott Paper Company announced publicly that it would terminate log driving on the Kennebec, the very activity in issue here, no later than October 1, 1976.[8] And in May of 1971 the Maine legislature enacted a statutory prohibition against all log driving on Maine rivers effective October 1, 1976, 38 M.R.S.A. § 418.

In order to discuss the proper application of the Acts of 1899 and 1900 to the activity in issue a brief description of these Acts, and their legislative history, is appropriate. Section 10 of the Act of 1899 bans the creation of obstructions to the navigable capacity of navigable waters of the United States, including the "building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty or other structures in any... navigable river" unless permission is obtained beforehand from the Secretary of the Army (on recommendation of the Chief of Engineers). Section 13 of the Rivers and Harbors Act of 1899 is the now famous Refuse Act and bans the deposit of refuse matter into navigable waters of the United States, either from floating craft or from the shore, or the deposit of material on the banks of any navigable water which might be washed into the water and obstruct navigation, unless prior permission is obtained from the Secretary of the Army.

Section 15 of the Rivers and Harbors Act of 1899 (33

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[5] 33 U.S.C. §§ 1151-1175.

[6] 33 U.S.C. §§ 1251-1376.

[7] The parties agree that the recent legislation has no direct bearing on this litigation.

[8] *See* 1 Maine Leg. Rec. 470, 497 (1971).

U.S.C. § 409) bans certain specific activities when conducted in such a way as to obstruct navigation. Relevant to our discussion is the prohibition contained in this section on the floating of "loose timber and logs" and "sack rafts of timber and logs" on streams or channels actually navigated by steamboats whenever it might "obstruct, impede, or endanger navigation". Section 15 contains no provision for permits; its proscriptions, unlike those of sections 10 and 13, are absolute.

The legislative history of the Rivers and Harbors Act in 1899 in general, and of sections 10 and 13 of that Act in particular, has been explored in some depth by the Supreme Court in *United States* v. *Republic Steel Corp.*, 362 U.S. 482 (1960), *United States* v. *Standard Oil Co.*, 384 U.S. 224 (1966), and, most recently, in *United States* v. *Pennsylvania Industrial Chemical Corp.*, 411 U.S. 655 (May 14, 1973). It is clear that the Act was considered by Congress to be not much more than a compilation of various pre-existing enactments. An 1897 report of the Chief of Army Engineers, submitted to Congress by the Secretary of War,[9] had set out the text of all federal laws concerning the protection of navigable waters and had recommended a new statute which would assemble the previously scattered legislation on the subject and would clarify some of the language. The understanding of the Congress as to this proposed new law was that in relation to prior law "There are not ten words changed in the entire thirteen sections".[10] As passed the Act of 1899 was said to contain "no essential changes in the existing law."[11]

But despite the congressional impression that very little that was new was contained in the Rivers and Harbors Act of 1899 the language in section 15 concerning log

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[9] H.R. Doc. No. 293, 54th Cong., 2d Sess. (1897).

[10] Statement of Senator Frye, Chairman of the Senate Rivers and Harbors Committee, 32 Cong. Rec. 2297 (1899).

[11] Statement of House Conferees, 32 Cong. Rec. 2923 (1899).

driving apparently originated in the Chief of Engineer's report. Unlike sections 10 and 13, this part of section 15 appears to have no statutory antecedents. Since the Act of 1899 engendered relatively little legislative comment or debate, and what there is does not mention log driving, the complete ban on this activity written into federal law in section 15 comes down to us without the usual clarifying light of legislative history.

The sweep of the prohibition on log driving contained in section 15 very quickly led to congressional reappraisal. The legislative history leading up to the adoption the next year of what is now 33 U.S.C. § 410 indicates that the concern which led to this amendment of section 15 related to the conflict between the needs of those who used the rivers to navigate steamboats and those who used the same rivers to float logs downstream to mill sites.[12] The language of section 15 resulted in a great over-weighting of the balance in favor of the steamboat, which imbalance the later Act was meant to rectify.

A bill to remove the log driving prohibition from section 15 was introduced in the first days of the very next session of Congress and referred to the House Committee on Rivers and Harbors.[13] The committee reported back a bill which would have exempted the Mississippi River above the St. Paul boom, and certain of its tributaries, from the reach of section 15, with provision for the regulation of log driving on those waterways by the Secretary of War. The report submitted to the House by the committee discussed the methodology of log driving on the rivers in question, and also discussed the extent of steamboat navigation. It found that "the inevitable result of carrying on this logging business in the way it is carried on is to obstruct, impede, and endanger such steamboat navigation

[12] *See* H.R. Rep. No. 731, 56 Cong., 1st Sess. (1900).
[13] 33 Cong. Rec. 840 (1900).

at certain seasons of the year",[14] but concluded that section 15 was too harsh a remedy. After House passage of this bill the Senate Committee on Commerce reported an amended bill which would have extended to any river, rather than just the upper Mississippi, the provision for regulation of log driving of the House bill, "whenever in [the Secretary of War's] judgment such regulations are necessary to equitably adjust and govern the conflicting interests of logging and other forms of navigation."[15] The bill also provided that whenever such regulations had been issued the river affected would then be exempt from section 15. The Conference Committee then devised the compromise measure which became the Act of May 9, 1900. It extended an exemption to section 15's ban on log driving to those rivers on which log driving is the principal form of navigation and also provided that the Secretary of War (now the Secretary of the Army) was empowered to issue regulations "so framed as to equitably adjust conflicting interests between the different methods or forms of navigation" on such rivers.[16]

II

The parties disagree as to the significance to be accorded to the fact that defendants are now barred by Maine law from continuing the activity at issue here after October 1, 1976. Defendants contend that the 1976 deadline makes this case, while obviously not technically moot, realistically unnecessary and undeserving of expenditure of the parties' and the court's energies. There are a number of reasons why we are unpersuaded by such arguments. First, the cessation of further log driving only goes to one aspect of the case, the propriety of a court order enjoining the activity, and does not affect the question of whether any

[14] H.R. Rep. No. 731, 56 Cong., 1st Sess. (1900) at 3.
[15] 33 Cong. Rec. 4405 (1900), Sen. Rep. No. 1035, 56 Cong., 1st Sess. (1900).
[16] 31 Stat. 172, now codified as 33 U.S.C. § 410.

remedial relief should be granted. Second, it is always possible that the present state deadline might be extended or eliminated. Third, three years is a fairly long time, long enough for the deposit on the bottom of the Kennebec of a not insubstantial number of logs, as well as loose bark.[17] Most important, this suit, although belated, charges a violation of federal laws designed to protect and conserve our rivers, described by the Supreme Court (quoting Mr. Justice Holmes) as "more than an amenity . . . a treasure."[18] Resolution of the issue presented in this case, with its possibility of recurrence wherever log driving is still carried on, presents us with what we consider to be an important question, and one which it is our duty to resolve.

It is clear that the upper Kennebec River, where the defendants engage in log driving, is one on which the principal form of navigation is log driving and thus is within the purview of the Act of May 9, 1900 (33 U.S.C. § 410). The government argues, however, that any exemptions from the provisions of the Rivers and Harbors Act of 1899 contained in the later Act are conditioned upon prior promulgation by the Secretary of the Army of regulations adjusting navigational conflicts. We cannot accept that analysis. The structure of the Act is such as to make the government's interpretation improbable. It begins with a flat and unconditional exemption from the prohibition contained in section 15 as to log driving. It then provides that such exempted activity shall be subject to regulations prescribed by the Secretary of the Army and states that

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[17] Based upon the figure, given in oral argument, of 300,000 cords of wood floated down the river each year and accepting approximately 2% as the rate that such logs sink to the bottom (*see* n. 4 *supra*) then in three years about 18,000 cords—or 2,304,000 cubic feet—of waterlogged wood would be deposited in the upper Kennebec.

[18] *United States* v. *Standard Oil Co.*, 384 U.S. 224, 230 (1966), quoting from *New Jersey* v. *New York*, 283 U.S. 336, 342 (1931).

the Secretary is "authorized and directed" to prescribe rules and regulations, so framed as to adjust conflicts between modes of navigation. Logically, this format is consistent only with the view that the promulgation of regulations is a condition subsequent, not a condition precedent, to the exemption.[19] We conclude that the duty of the Secretary of the Army, under the Act of May 9, 1900, to issue rules and regulations is not a condition precedent to the exemption contained in the Act to the ban on log driving contained in section 15 of the Rivers and Harbors Act of 1899.[20]

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[19] Had Congress intended to make the exemption from section 15's ban on log driving conditional upon prior promulgation of navigational rules it could clearly have chosen a more apparent means than the wording of the Act of 1900. Particularly is this so in view of the clear and unequivocal way in which Congress framed sections 10 and 13 of the Act of 1899. In those sections certain behavior is illegal unless prior permission is obtained. Furthermore, in the legislative history of the Act of 1900 an alternative phrasing was considered and rejected which would have created an exemption only after rules and regulations had in fact been promulgated for the particular river. It is also highly unlikely that Congress intended an entire set of rules and regulations, as distinguished from a permit as in sections 10 and 13, to be a condition precedent to legal behavior. And where a river like the upper Kennebec is concerned, on which, as found below, no significant navigation other than by log driving has ever taken place, there would appear to be little logic in requiring that regulations be issued for the purpose of resolving a nonexistent conflict between forms of navigation, before the exemption would be effective.

[20] The government also contends that the language used in the Act of 1900, "floating loose timber and logs, or sack rafts, so called, of timber and logs" does not refer to the entire practice of log driving but only those aspects literally encompassed in the language used. But there is not the slightest reason to believe that Congress meant the statute to have such a cramped and unnatural reading. The terms set out above were obviously a way to describe the traditional log drive as a whole and were the very terms used in section 15 of the Rivers and Harbors Act of 1899. Moreover, the language used rather adequately described the Kennebec log drive as it is carried on today. "Floating of loose timber and logs" is the way logs are moved by defendants on those stretches of the Kennebec where the current is strong enough to carry the logs downstream, and "sack

We now come to the heart of the issue. The district court, in a thoughtful and well documented opinion, concluded that the Act of May 9, 1900 not only exempted log driving on rivers like the Kennebec from the flat prohibition of section 15 of the Rivers and Harbors Act of 1899, but from sections 10 and 13 as well. It thought such a result required because otherwise one would have to "attribute to Congress an intent to legalize log driving and at the same time to prohibit its unavoidable side effects."[21]

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rafts . . . of timber and logs" refers to the means used to move logs across the places lacking strong current. (For descriptions of sack rafts *see The Mary*, 123 F. 609, 611, 613 (S.D. Ala. 1903) and *The Athabasca*, 45 F. 651, 653 (W.D. Mich., N.D. 1890)). Therefore, we find that the traditional log drive, as carried out on the Kennebec, is encompassed by the terms used in 33 U.S.C. § 410.

The government also makes arguments based upon the premise that the first paragraph of 33 U.S.C. § 410 which refers to "floating loose timber and logs, or sack rafts, so called, of timber and logs" is more limited in scope than the second paragraph which refers to "floating of loose timber and logs, and sack rafts (so called) of timber and logs *and other methods of navigation* on the streams and waterways, or any thereof, of the character, as to navigation, heretofore in section one hereof described [first paragraph of this section]." [Emphasis added.] But since the second paragraph has to do with the authority of the Secretary of the Army to promulgate regulations, the reference to "other methods of navigation" is not meant as a description of additional aspects of the practice of log driving, but as a description of entirely different modes of river navigation with which log driving can potentially conflict, and thus to which regulations resolving navigational conflicts would refer. We therefore find no basis in the statutory language, and also find no basis in the legislative history, or in logic, for the offered premise and reject the arguments based thereon.

[21] There is no legal precedent on the precise point presented in this appeal. The only reported cases involving challenges to logging practices under the Rivers and Harbors Act of 1899 or its predecessor statutes did find that booms were subject to challenge as obstructions to navigation, *United States* v. *Bellingham Bay Boom Co.*, 176 U.S. 211 (1900), *United States* v. *Wishkah Boom Co.*, 136 F. 42 (9th Cir. 1905), but *Bellingham* was decided prior to passage of the Act of May 9, 1900 and *Wishkah*, although it presented a case where the Act of 1900 would appear to have been at least facially applicable, simply ignored that statute. In *United States* v. *Marhtinson*, 58 F. 765

While we agree with the district court, for reasons set forth below, that the exemption to section 15 of the 1899 Act in the Act of 1900 necessarily extends as well to section 10, we do not agree that it also extends to the pollution control aspects of section 13. First of all, there is no logical dilemma in finding log driving on rivers like the Kennebec exempt from section 15 but not exempt from section 13. Section 13 does not operate as a complete prohibition on any activity. Discharge of refuse is illegal only if no permit is obtained beforehand. There is a vast array of human activity, particularly commercial activity, which requires prior governmental permission. But one does not in common sense terms think of such activity as prohibited. Rather, it is thought that it is limited or controlled. The very sweep of section 13 argues against the view that Congress could have meant it as a stark ban on all behavior encompassed within its broad terms. Instead, it was envisaged as a means of regulating and bringing under scrutiny actions which might threaten the well-being of the nation's waterways. In contrast, section 15 is absolute. There is no way to escape its proscription other than to entirely cease the illegal conduct. Congress, in retaining the applicability of section 13 to log driving, did not legalize log driving and at the same time prohibit its unavoidable side effects and so produce a contradictory result. It merely quite logically exempted it from the absolute ban of section 15 while retaining the much more limited restriction produced by section 13. Such a reading of the scope of the Act of 1900 produces a consistent and reasonable legislative scheme. Furthermore, Congress did not say in the Act of May 9, 1900, as it very easily could have, that log driving on the particular rivers was to be

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(D. S.C. 1893), the court found that the provisions of the Rivers and Harbors Act of 1890 barring obstruction to the navigable capacity of rivers did not apply to the floating of logs or rafts of logs.

exempt from all provisions of the prior Act. In terms t
exemption extends only to section 15.

The legislative history demonstrates that the concern
Congress in enacting the Act of 1900 was the navigatio
conflict between steamboat traffic and log driving, whi
conflict section 15 of the 1899 Act had resolved entir
in favor of the steamboat.[22] It was in the context of t
lifting of the complete ban of section 15 that statemen
were made to the effect that log driving was being legaliz
However, there is not a word in the legislative histo
or in the 1900 Act, concerning the sinking of waterlogg
timber, the sloughing of bark, or the pollution caused
log driving. After exhaustive research into the history a
purposes of the Rivers and Harbors Act of 1899
Supreme Court has concluded that section 13 of that A
was intended by the Congress to prevent pollution, as w
as obstruction, of navigable waters.[23] As found by

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[22] *See* H.R. Rep. No. 731, 56 Cong., 1st Sess. (1900).
examples of the kinds of conflicts that had arisen between log dri
and steamboats, *see, e.g., The Mary*, 123 F. 609 (S.D. Ala. 190
Hall v. *Chisholm*, 117 F. 807 (6th Cir. 1902), *The Athabasca*,
F. 651 (W.D. Mich., N.D. 1890).

[23] We therefore disagree with the view expressed by the Sev
Circuit in *United States* v. *United States Steel Corp.*, 482 F.2d
(1973), to the effect that while Congress may have intended
the Refuse Act ban deposit of any matter of any kind, Cong
thought that the Secretary of War would have no authority to
a permit purely on non-navigational grounds. A fair reading of
Supreme Court's pronouncements on this subject, particularly *U*
States v. *Pa. Indust. Chem. Corp.*, which was handed down
the *U.S. Steel Corp.* decision, can only lead to the conclusion
its study of the Rivers and Harbors Act of 1899 and its hi
convince the Court that the Congress was concerned with poll
ab initio. This view is supported by the wording of section 1
that while the ban on dumping of material on the banks of water
is illegal only if obstruction to navigation results, the ban on dum
of matter directly into the water is not so limited. Further
predecessor statutes had included in the list of particular mat
barred from deposit materials like the "sawmill waste", "bal
"steam-boat ashes", "oysters and rubbish" referred to by Mr. J
Douglas in *United States* v. *Standard Oil Co.*, 384 U.S. 224,

Court, "the 'serious injury' to our watercourses . . . sought to be remedied [by the Rivers and Harbors Act] was caused in part by obstacles that impeded navigation and in part by pollution", and that the term "refuse" as used in section 13 "includes all foreign substances and pollutants . . . .", *United States* v. *Standard Oil Co.*, 384 U.S. 224, 228-29, 230 (1966), a finding strongly reaffirmed in *United States* v. *Pennsylvania Industrial Chemical Corp.*, 411 U.S. 655, 671 (1973). *See also Illinois* v. *City of Milwaukee*, 406 U.S. 91, 101 (1972). The Court has also repeatedly admonished that the Refuse Act be dealt with by the courts "charitably", an admonishment that would not be heeded by us were we to find an exception to the operation of section 13 by virtue of a later statute which does not even mention section 13, or pollution, and whose legislative history is barren of the least hint that the creation of such an exception was contemplated.

But while the matter of pollution is not mentioned or dealt with in the Act of 1900, the use of booms in the navigation of floating logs was recognized by reference to booms in the House Report.[24] Moreover, the use of booms is an integral part of the control of floating timber. Many of the regulations promulgated pursuant to the Act of May 9, 1900 recognize that the location and use of logging booms is often vital to any plan to minimize navigational conflicts.[25] Under these circumstances, it is clear that the district court was correct in finding that

(1966), and characterized by him as "pollutants". Contemporary concern in the Congress over the hazard to the public welfare posed by water pollution can be discerned in H.R. Rep. No. 89, 56 Cong., 1st Sess. (1900), in which the House Committee on Commerce proposed the creation of a scientific commission to investigate water pollution, saying in part, "It is one of the inalienable rights of the people to have the water for drinking, for watering stock, for manufacturing, agricultural, and domestic uses, come to them in its natural accustomed flow, free from pollution or sewage cast into it . . . ."

[24] H.R. Rep. No. 731, 56 Cong., 1st Sess. (1900) at 3.

[25] *See* 33 C.F.R. §§ 207.380, 207.360, 207.780, 207.663 (1972).

in exempting logging from the navigational restric
section 15 of the Act of 1899 the Congress must nec
have also meant to exempt logging booms fr
restriction contained in any other sections. Th
analysis includes other aspects of log driving whic
have a navigational impact. The purposes served
tion 10 (and one of the purposes served by sec
and the purposes served by section 15 in this ma
essentially the same. Furthermore, these interest
large part preserved by the provision in the Act
for promulgation of rules and regulations to adj
gational conflict.

The regulations which the Secretary of the
empowered to issue under the Act of 1900 are co
the question of navigational conflicts, unlike the
authorized under section 13 of the Rivers and Har
of 1899 which are not so limited in terms.[26] Thi
sistent with the view that Congress conceived of
of 1900 as resolving the navigational conflict betw
ging on waterways like the upper Kennebec R
other forms of water transport in favor of log
that it had no intent to exempt this activity
pollution control features of section 13 of the

We therefore find that the Act of May 9, 1900
log driving on the upper Kennebec (and its
incidents, including the use of logging booms)
provisions of the Rivers and Harbors Act of
cerned with obstruction to navigation, and conf

[26] In discussing the proviso in section 13 authorizing t
of permits the Supreme Court has said, "In exercising tha
the proviso requires the Secretary to rely on the judgm
Chief of Engineers that anchorage and navigation will not
by such deposits. But, even in a situation where the Chi
neers concedes that a certain deposit will not injure anc
navigation, the Secretary need not necessarily permit
for the proviso makes the Secretary's authority discretiona
provides that the Secretary 'may permit' the deposit." *U*
v. *Pennsylvania Industrial Chemical Corp.*, 411 U.S. 655,

other modes of navigation, but that nothing in the Act or its legislative history exempts this activity from the restrictions on pollution of navigable waters found in the Refuse Act (33 U.S.C. § 407).

III

The district court found that section 13 is "facially applicable" to defendants' activities and that "peeled bark and sunken logs on the river bottom are deposits of 'refuse matter' within the meaning of section 13". We concur with these findings and remand for a determination of the question which the court below felt that it did not have to reach; whether there are certain deposits of material into navigable waters so intimately related to the actual conduct of navigation by water that despite the facial applicability of the statute it could not have been in the contemplation of Congress that it apply in such instances.

If the district court finds a violation of section 13 of the Rivers and Harbors Act of 1899 it will then be faced with the question of appropriate relief. We have been advised by counsel that a permit program is now in effect. Should this not be so, this fact will of course be taken into account in framing any equitable decree affecting future log driving. Insofar as relief in the nature of removing the accumulated refuse of three quarters of a century is concerned, we recognize that the burden of removing all of the logs which may have sunk to the bottom of the river in seventy-three years is obviously an extremely heavy one. Hercules, asked to clean the Augean stables, diverted the courses of two rivers, but he had clean rivers to work with. Furthermore, defendants may be able to argue that they relied on long standing government action or inaction. While such reliance will not excuse disobedience to the law it may be a consideration to be weighed in the framing of broad equitable relief. The

requirements of fairness invoked by the Court in *States* v. *Pennsylvania Industrial Chemical Corp.* in gauging the propriety of criminal sanctions, n apply when extreme hardship may be caused by a decree in this type of case.

On the other hand, those who defend our waterways confront us with compelling and urge lems, in the words of the Supreme Court, a "c which requires that the courts act in the broa interest. The preservation of our rivers was undertaken by the Congress when it enacted th and Harbors Act of 1899. That the age and obs this statute does not diminish its force and that vention of pollution was at least one of its a made entirely clear in *Pennsylvania Industrial Corp.*, which was handed down by the Supren after the decision below. Thus, while awarenes economic and practical burdens which might b upon those who use the rivers for logging may m limit the scope of relief given, it cannot toda ignoring the terms of section 13 of the Rivers and Act of 1899.

Judgment vacated. Remanded to the District proceedings not inconsistent with this opinion.

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[21] *United States* v. *Standard Oil Co.*, 384 U.S. 224, 2

APPENDIX C

United States Court of Appeals

FOR THE FIRST CIRCUIT

No. 73-1163.

UNITED STATES OF AMERICA,
Plaintiff, Appellant,

v.

KENNEBEC LOG DRIVING COMPANY ET AL.,
Defendants, Appellees.

JUDGMENT

Entered November 30, 1973

This cause came on to be heard on appeal from the United States Distric

for the District of Maine , and was

by counsel.

Upon consideration whereof, It is now here ordered, adjudged and dec

follows: The judgment of the District Court is vacated and the c
remanded to that Court for further proceedings not inconsistent
the opinion filed this day. No costs at this time.

By the Court:

/s/ Dana H. Gallup

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 73-1163.

UNITED STATES OF AMERICA,
Plaintiff, Appellant,

v.

KENNEBEC LOG DRIVING COMPANY ET AL.,
Defendants, Appellees.

Before COFFIN, Chief Judge,
McENTEE and CAMPBELL, Circuit Judges.

MEMORANDUM and ORDER

Entered December 19, 1973

Petitioner reads into the language of page 15 of the slip opinion, lines 11-16, which it considers "incongruous", an implicit ruling that section 13 is inapplicable to deposits of refuse "intimately related to the actual conduct of navigation by water." We intended no such ruling. The district court did not reach the contention of the defendants that their activities did not violate sections 10 and 13, despite its finding that those sections are "facially applicable" to those activities. Because this point was not decided below and not properly or fully presented to us for decision we merely declined to consider it.

In order to insure that our intention is not misperceived we have decided to add a footnote (footnote 27 -- the superior number 27 to appear following the word "instances." appearing at the end of the first full paragraph on page 15) as follows:

> We mean to intimate no view as to whether or not any such interpretation of the language of the statute can be justified, nor, if it can, whether defendants can take advantage of it.

Present footnote 27 on page 16 is to be renumbered footnote 28.

By the Court:

Clerk.

APPENDIX E

STATUTORY APPENDIX

33 U.S.C. § 403

(SECTION 10 OF THE RIVERS AND HARBORS ACT OF 1899)

The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same.

33 U.S.C. § 407

(SECTION 13 OF THE RIVERS AND HARBORS ACT OF 1899)

It shall not be lawful to throw, discharge, or deposit, or cause, suffer, or procure to be thrown, discharged, or deposited either from or out of any ship, barge, or other floating craft of any kind, or from the shore, wharf, manufacturing establishment or mill of any kind, any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state, into any navigable water of the United States, or into any tributary of any navigable

water from which the same shall float or be washed into such navigable water; and it shall not be lawful to deposit, or cause, suffer, or procure to be deposited material of any kind in any place on the bank of any navigable water, or on the bank of any tributary of any navigable water, where the same shall be liable to be washed into such navigable water, either by ordinary or high tides, or by storms or floods, or otherwise, whereby navigation shall or may be impeded or obstructed: *Provided*, That nothing herein contained shall extend to, apply to, or prohibit the operations in connection with the improvement of navigable waters or construction of public works, considered necessary and proper by the United States officers supervising such improvement or public work: *And provided further*, That the Secretary of the Army, whenever in the judgment of the Chief of Engineers anchorage and navigation will not be injured thereby, may permit the deposit of any material above mentioned in navigable waters, within limits to be defined and under conditions to be prescribed by him, provided application is made to him prior to depositing such material; and whenever any permit is so granted the conditions thereof shall be strictly complied with, and any violation thereof shall be unlawful.

33 U.S.C. § 409

(SECTION 15 OF THE RIVERS AND HARBORS ACT OF 1899)

It shall not be lawful to tie up or anchor vessels or other craft in navigable channels in such a manner as to prevent or obstruct the passage of other vessels or craft; or to voluntarily or carelessly sink, or permit or cause to be sunk, vessels or other craft in navigable channels; or to float loose timber and logs, or to float what is known as "sack rafts of timber and logs" in streams or channels actually navigated by steamboats in such manner as to obstruct, impede, or endanger navigation. . . .

33 U.S.C. § 410

(Act of May 9, 1900)

The prohibition contained in section 409 of this title against floating loose timber and logs, or sack rafts, so called, of timber and logs in streams or channels actually navigated by steamboats, shall not apply to any navigable river or waterway of the United States or any part thereof whereon the floating of loose timber and logs and sack rafts of timber and logs is the principal method of navigation. But such method of navigation on such river or waterway or part thereof shall be subject to the rules and regulations prescribed by the Secretary of the Army as provided in this section.

The Secretary of the Army shall have power, and he is authorized and directed to prescribe rules and regulations, which he may at any time modify, to govern and regulate the floating of loose timber and logs, and sack rafts, (so called) of timber and logs and other methods of navigation on the streams and waterways, or any thereof, of the character, as to navigation, heretofore in this section described. The said rules and regulations shall be so framed as to equitably adjust conflicting interests between the different methods or forms of navigation; and the said rules and regulations shall be published at least once in such newspaper or newspapers of general circulation as in the opinion of the Secretary of the Army shall be best adapted to give notice of said rules and regulations to persons affected thereby and locally interested therein....

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1266

KENNEBEC LOG DRIVING CO., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITI

The United States brought this action to enjoin t petitioners from continuing to use the Kennebec Riv in Maine for log drives and to require them to cont bute to cleaning up the damage already done to t river by their log drives.

The objectionable features of the drives were that t floating logs and booms preempted the use of the surfa of the river and that logs and large quantities of ba which had sunk in the drives, covered the river bott with decaying material which consumed all the oxyg in the water, preventing aquatic life (see Pet. App. 2b).

The United States brought this action under Sectio 10 and 13 of the Rivers and Harbors Act of 18

30 Stat. 1151-1152, 33 U.S.C. 403 and 407.[1] that by placing booms in and across the riv trol the logs, as well as by allowing the log in the river, petitioners placed unauthorized o in the river in violation of Section 10 of th that by permitting logs and bark to sink to petitioners deposited refuse in violation of of the Act.

Petitioners' principal defense was that the 9, 1900, 31 Stat. 172, 33 U.S.C. 410, superse tire 1899 Act with respect to log driving a log drivers only to such regulations as th Engineers may impose, and none was imp The district court, in a decision rendered Court's opinion in *United States* v. *Pennsylv trial Chemical Corp.*, 411 U.S. 655, held t of 33 U.S.C. 410, neither Section 10 nor Se the Rivers and Harbors Act could apply to on the Kennebec River (Pet. App. A). The peals vacated the judgment of the district co that the 1900 Act superseded Section 10 Act (obstructions to navigation) by statuto ting log drives subject only to such regula Corps of Engineers might enact but that it did make Section 13 (deposit of refuse) inapp court remanded the case to the district cou mine whether the sunken logs and bark mately related to the actual conduct of n water that despite the facial applicability of it could not have been in the contemplation that it apply in such instances" (Pet. App. B,

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[1]Sections 10, 13, and 15 of the Rivers and Ha 33 U.S.C. 410, relied upon by petitioners, are se nent part at Pet. App. E, 1e-3e.

1. The 1899 Rivers and Harbors Act has three
tions relevant to this decision. Section 10 gene
prohibits obstructions to navigation not approved
advance by the Secretary of the Army. Section 13
larly prohibits deposits of refuse, except as permitte
the Secretary of the Army. Section 15, in con
flatly forbids anchoring vessels or floating log
navigable channels actively used by steamboats
manner which obstructs the passage of vessels.

The Act of May 9, 1900 (33 U.S.C. 410) is, b
terms, addressed to Section 15 of the Rivers and
bors Act. It modifies that section by removing the
lute prohibition of blocking navigation by log drive
authorizes the Secretary of the Army to prescribe
for the floating of logs on rivers where that is the
cipal method of navigation, in a manner to adjust
flicts between loggers and other persons using the
for navigation.

In our view, the court of appeals erred in ho
that the Act of 1900 superseded Section 10 as w
Section 15 of the 1899 Act, and its remand for
tional findings as to Section 13 is the kind of na
and cramped reading of the 1899 Act rejected by
Court in *United States* v. *Pennsylvania Industrial C*
ical Corp., supra, 411 U.S. at 669-670; *United Sta*
Standard Oil Co., 384 U.S. 224, 226, 230; and *U*
States v. *Republic Steel Corp.,* 362 U.S. 482, 491.

We have not petitioned for certiorari, however
cause the decision does not conflict with that of any
court of appeals, and may prove on the remand t
district court to be sufficient to obtain the relief s
in this case.[2]

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[2]Moreover, the Scott Paper Company, the only presen
of the River for log drives, has announced its intention t
using the Kennebec for log drives by October 1, 1976. S
App. B, 4b.

2. There is, in any event, no support for petitioners' contention that the 1900 Act rendered Section 13 of the Rivers and Harbors Act facially inapplicable to log drives. The 1900 Act, as we have shown, is merely a partial repeal of Section 15 of the 1899 Act, which flatly prohibited log driving on waters navigated by steamboats where the drive would interfere with the steamboats. Sections 10 and 13 of the 1899 Act were not repealed, in whole or in part. Petitioners' contention that the 1900 Act made Section 13 of the 1899 Act wholly inapplicable to log drives would create a repeal by implication, which should not be imputed to Congress. See *Posadas* v. *National City Bank,* 296 U.S. 497, 503; *United States* v. *Jackson,* 302 U.S. 628, 631. The 1900 Act changed the balance between log driving and steam navigation with respect to obstructions to navigation. There is no inconsistency between that Act and a continued requirement that log drivers, as well as other users of the rivers and harbors, not deposit refuse in them without prior permission from the Corps of Engineers. See *United States* v. *Pennsylvania Industrial Chemical Corp., supra.*

Moreover, there has as yet been no finding of fact in this case on the necessity for the pollution connected with these log drives, or on whether, if petitioners would suffer the expense, logs could be driven without such violations of Section 13 of the River and Harbors Act. And, under the court of appeals' remand order, it is still open to petitioners to try to show that the pollution caused by log driving is so "intimately related to * * * navigation" that Congress could not have intended Section 13 to apply.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

WALLACE H. JOHNSON,
Assistant Attorney General.

WALTER KIECHEL, JR.,
Deputy Assistant Attorney General.

RAYMOND N. ZAGONE,
CARL STRASS,
Attorneys.

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No. 73-1266

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MICHAEL R

Supreme Court of the United States

OCTOBER TERM 1973

KENNEBEC LOG DRIVING COMPANY, ET AL., *Petitioners,*

v.

UNITED STATES OF AMERICA, *Respondent.*

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

ROBERTS B. OWEN
WILLIAM D. IVERSON
COVINGTON & BURLING
888 Sixteenth Street, N.W.
Washington, D.C. 20006
Attorneys for Petitioners

Of Counsel:

VINCENT L. MCKUSICK
DANIEL E. BOXER
PIERCE, ATWOOD, SCRIBNER, ALLEN
& MCKUSICK
One Monument Square
Portland, Maine 04111

LOYALL F. SEWALL
VERRILL, DANA, PHILBRICK,
PUTNAM & WILLIAMSON
57 Exchange Street
Portland, Maine 04111

NORMAN M. HEISMAN
ELLIS A. HORWITZ
Scott Paper Company
Scott Plaza
Philadelphia, Pennsylvania 19113

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OCTOBER TERM 1973

No. 73-1266

KENNEBEC LOG DRIVING COMPANY, ET AL., *Petitioners,*

v.

UNITED STATES OF AMERICA, *Respondent.*

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

Petitioners have requested the Court to grant a writ of certiorari in this case because the Court of Appeals' decision presents an important question concerning the proper interpretation of the statutory framework created by Congress in the Rivers and Harbors Act of 1899 as amended in 1900, and because the decision below—as the Court of Appeals itself explicitly recognized—has potentially far-reaching significance for those elements of the American timber industry which are heavily dependent upon the transport of logs by water.

In opposing the grant of a writ, the United States does not challenge—and therefore presumably agrees

with—the Court of Appeals' characterization
case as presenting "an important question" a
water transportation throughout the timber i
(App. B. at 8b). Indeed, the Government does
contend that this important issue is inappropr
certiorari review. The Government's principal
tion, which is put forward as a flat conclusion
any real analysis or explanation, is that the de
the Court of Appeals below was correct on th
(Memorandum in Opposition 4). Presumably
ernment's very brief discussion of the latter
intended to suggest that, however important t
may be to the timber industry, the legal issues
are exceedingly simple and that the Court of
resolution of those issues was incontestably c
despite the fact that District Judge Gign
reached a precisely contrary conclusion in an
which the Court of Appeals itself characte
"thoughtful and well-documented" (App. B a

The two opinions below demonstrate that t
portant legal issues are substantially more
than is implied by the Government. Both lowe
agreed that the 1900 amendment of the 1899 Ri
Harbors Act was intended to "legalize" log dr
specified rivers falling within the ambit of th
and Harbors Act. In the words of Distric
Gignoux, who undertook a thorough review of t
lative history of the 1900 Act, Congress at t
"explicitly authorized log drives on rivers, suc
upper Kennebec, where log drives are the p
method of navigation, subject only to regul
the . . . Secretary of the Army" (App. A.
Judge Gignoux then reasoned that, in thus aut

such log drives, Congress could scarcely have assumed or intended that the prohibition contained in Section 13 of the 1899 Rivers and Harbors Act would nevertheless apply to the necessary and inevitable incidents of log driving on the rivers involved, because the illogical result would have been to prohibit, in effect, the very activity which the Congress was seeking to authorize. Accordingly, in order to reach a harmonious interpretation of the statutory framework as a whole, and thus to give meaning and substance to each of its provisions, Judge Gignoux concluded that Congress must have intended the 1900 amendment to supersede whatever applicability Section 13 of the 1899 Act might otherwise have had to log driving on these rivers.

Although the Court of Appeals agreed that the purpose of the 1900 Act was to legalize log driving on such rivers, it disagreed with Judge Gignoux's view of the interaction between the 1900 amendment and Section 13 of the 1899 Act, for reasons which reflect, in petitioners' view, a fundamental misunderstanding of the prohibitory nature and operation of the 1899 Act (see Petition for Certiorari 13-16). But whichever view of the statutory scheme is correct, the legal issues are clearly more complex and far-reaching than the Government suggests by its abbreviated comments on the merits.[1]

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[1] Contrary to the Government's assumption at page 4 of its Memorandum in Opposition, nether Judge Gignoux nor petitioners have suggested that the 1900 amendment "repealed" Section 13 of the 1899 Act. In order to give each provision in the statutory scheme its appropriate scope and substance, Judge Gignoux interpreted Section 13 of the 1899 Act as being of narrower scope than the Government contends, but no question of implied repeal is here involved.

Finally, we feel obliged to call attention to
tant inaccuracy, inadvertent we are sure, in
orandum in Opposition. The Government
"there has as yet been no finding of fact in t
the necessity for the pollution connected wit
drives [*i.e.*, the sinking of occasional log
sloughing off of bits of bark], or on whethe
tioners would suffer the expense, logs could
without such violations of Section 13 of the
Harbors Act" (Memorandum in Opposition
during the proceedings before Judge Gign
District Court, petitioners submitted affida
out challenge or even response by the Gov
which directly addressed that issue, and Judg
then expressly found that "[e]very log drive
the Kennebec log drive, *necessarily* inv
sloughing off of bark into the river and the
logs which have become waterlogged" (Ap
emphasis added). The Government is simpl
in its assertion that "there has as yet been n
fact" on that subject; there has been, and t
ment has never challenged it.

Since this case involves admittedly impo
tions of statutory interpretation regardin
nature and purpose of Section 13 of the
and Harbors Act and the effect of the 1900
of that statute, and since these important a
issues were resolved by the Court of Appeal
manner which appears to be inconsistent
decisions of this Court, the case deserves
certiorari.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be granted.

ROBERTS B. OWEN
WILLIAM D. IVERSON
COVINGTON & BURLING
888 Sixteenth Street, N.W.
Washington, D.C. 20006
Attorneys for Petitioners

Of Counsel:

VINCENT L. MCKUSICK
DANIEL E. BOXER
PIERCE, ATWOOD, SCRIBNER, ALLEN
& MCKUSICK
One Monument Square
Portland, Maine 04111

LOYALL F. SEWALL
VERRILL, DANA, PHILBRICK,
PUTNAM & WILLIAMSON
57 Exchange Street
Portland, Maine 04111

NORMAN M. HEISMAN
ELLIS A. HORWITZ
Scott Paper Company
Scott Plaza
Philadelphia, Pennsylvania 19113